Filed 7/12/10 P. v. Alvarenga CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS ALVARENGA, Defendant and Appellant.	B218059 (Los Angeles County Super. Ct. No. GA071967)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert Perry, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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INTRODUCTION

Defendant and appellant Jose Luis Alvarenga (defendant) pleaded no contest to two counts of second degree robbery (Pen. Code, § 211)[1] and one count of false imprisonment by violence (§ 236). He also admitted a firearm enhancement allegation. (§ 12022.53, subd. (b).)

Defendant's appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) raising no issues and requesting that this court independently review the record. We gave notice to defendant that his appointed counsel had not found any arguable issues and that defendant had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wanted us to consider. We received a letter from defendant alleging that his signature had been forged on his notice of appeal and his request for a certificate of probable cause. Defendant asserts that, as a result of the alleged forgeries, he received the ineffective assistance of counsel, in violation of his Sixth Amendment rights.

We reject defendant's Sixth Amendment argument. Based on our independent review of the record, we conclude that there are no arguable issues on appeal. We therefore affirm the judgment.

BACKGROUND

A. Factual Background[2]

Eydi Munoz was employed at Porto's Bakery in Burbank. Munoz and two of her friends, David Monterrosa and Jorge Aguilar, agreed to rob Porto's. Their plan called for Munoz to leave open the rear door of the bakery, which was normally kept locked.

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[1] All statutory references are to the Penal Code.

[2] The facts of defendant's crimes are derived from the preliminary hearing transcript.

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On December 28, 2007, Munoz left the rear door open. Defendant—along with Monterrosa, Aguilar and three others—entered the bakery. They were masked and armed with handguns, and they used walkie talkies to communicate. A number of employees were present in the bakery. The employees were forced to the ground and their hands were bound. The robbers took wallets from some employees and one employee's cell phone. The robbers forced a management employee, Braulio Garcia, to open a safe. The robbers stole $14,951.00 in cash from the safe. They also took a laptop computer and a money counting machine. A video recording of the robbery was made by the bakery's surveillance system.

When interrogated by Burbank police, Eydie Munoz admitted her involvement in the robbery and identified a photograph of defendant—whom she knew by the gang moniker Mudo—as a participant in the robbery. Jorge Aguilar also admitted to his involvement and told police that defendant had helped plan and execute the crime.

Defendant was interrogated by police at the Burbank police station. Defendant was given *Miranda*[3] warnings in Spanish. Defendant acknowledged that he knew and understood his rights. Defendant admitted to police that he had been involved in the robbery. He told police that Aguilar and Monterrosa also were involved. Defendant admitted that he had taken the laptop computer from that bakery, and that after the robbery was completed he had received partial payment for his participation. He said that he and the other robbers were members of the Mara Salvatrucha street gang and that they had worn the gang's blue and white colors during the robbery. The parties stipulated that Mara Salvatrucha was a criminal street gang within the meaning of section 186.22.

B. Procedural Background

Defendant was charged with four counts of kidnapping to commit robbery (§ 209, subd. (b)(1)); three counts of second degree robbery (§ 211); and 12 counts of false

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

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imprisonment by violence. The information specially alleged various gang and firearm enhancements. (§§ 186.22, subds. (b)(1)(B), (b)(1)(C), (b)(4); 12022, subd. (a)(1); 12022.5, subd. (a); 12022.53, subds. (b), (e)(1).) The information also alleged that defendant had one strike prior (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(*i*)) and one prior prison term (§ 667.5, subd. (b)). The trial court dismissed the kidnapping charges pursuant to section 995.

Defendant moved to suppress his statement to police, arguing that his statement had been coerced after he had invoked his right to attorney. Defendant later submitted a supplemental memorandum of points and authorities asserting that, although the interrogating officers had given defendant *Miranda* warnings and defendant had acknowledged that he knew and understood his rights, the officers never explained to defendant what his rights meant, asked defendant to explain what they meant, or expressly asked defendant if he waived those rights. Defendant submitted a partial transcript of his interrogation in support of his motion.[4]

The trial court denied the motion to suppress. The trial court found that there was a clear implied waiver because defendant had been advised of his rights and indicated that he understood them, yet he responded to the officers' questions.

After the ruling on the motion to suppress, defendant entered a no-contest plea to two counts of robbery and one count of false imprisonment by violence, pursuant to a plea agreement that provided for dismissal of the other charges and specified a prison term of 20 years. The trial court sentenced defendant to the agreed aggregate term of 20 years, consisting of the upper term of 5 years on the base robbery count, plus ten years for the section 12022.53, subdivision (b) firearm enhancement; a consecutive term of 1 year (one third of the mid term) on the second robbery count, plus 3 years and four months (one third of the 10-year mid term) on the firearm enhancement; and a consecutive term of 8 months (one third of the mid term) on the false imprisonment

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[4] The transcript did not support defendant's earlier assertion that he expressly had invoked his right to counsel.

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charge. The trial court also imposed three $20 court security assessments, a $200 restitution fine, and a $200 parole revocation restitution fine, stayed. Defendant received 586 days of presentence credit, consisting of 510 days of actual custody and 76 days of conduct credit.

Defendant timely filed a notice of appeal and submitted a request for a certificate of probable cause. Both documents are signed in defendant's name, but bear the notation "MB"—presumably referring to defendant's trial court attorney, Michael Belter. The notice of appeal specified that it was based on the trial court's denial of defendant's "motion to suppress, made pursuant to Penal Code Section 1538.5," and that it did not otherwise challenge the validity of defendant's plea. The request for certificate of probable cause also stated that the appeal was "from the Court's denial of defendant's Motion to Suppress, pursuant to Penal Code 1538.5." The trial court denied the request for a certificate of probable cause on the ground that section 1538.5, subdivision (m) provides that no certificate is required to appeal a ruling denying a motion to suppress under section 1538.5.

DISCUSSION

Both defendant's notice of appeal and his request for a certificate of probable cause specify that defendant's appeal concerns the trial court's "denial of [defendant's] Motion to Suppress, pursuant to Penal Code 1538.5." The trial court correctly ruled that no certificate of probable cause was required to appeal the denial of a motion to suppress made under section 1538.5. (§ 1538.5, subd. (m).) It appears, however, that defendant's motion to suppress his statement was *not* brought pursuant to section 1538.5.

By its terms, section 1538.5 concerns motions to suppress evidence obtained pursuant to an *illegal search or seizure.* (§ 1538.5, subd. (a)(1); see *People v. Newell* (1979) 93 Cal.App.3d 29, 36 [§ 1538.5 is directed toward implementation of defendant's Fourth Amendment rights].) Defendant's motion, however, was based on alleged violations of his Fifth and Sixth Amendment rights; the motion neither cited nor discussed either the Fourth Amendment or section 1538.5. Our Supreme Court has held

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that "a motion to suppress statements for claimed violations of Fifth and Sixth Amendment rights is not properly brought under section 1538.5. A motion under that section lies to exclude evidence obtained in violation of the right to be free from unreasonable searches and seizures." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1049, reversed on other grounds in *Stansbury v. California* (1994) 511 U.S. 318.) Accordingly, it appears that defendant was required to obtain a certificate of probable cause to perfect his appeal. (§ 1237.5; Cal. Rules of Court, rule 8.304(b)(1), (4).)

Regardless of whether a certificate of probable cause was required, we have independently reviewed the entire record and we have found no arguable basis to suppress defendant's statement to police. (See *Berghuis v. Thompkins* (2010) __ U.S. __, 130 S.Ct. 2250.) We are therefore satisfied that defendant's appellate counsel fully complied with his responsibilities. (*Wende, supra*, 25 Cal.3d at p. 441.)

In his supplemental brief, defendant contends that his signature was forged on his notice of appeal and his request for a certificate of probable cause, and that he therefore received ineffective assistance of counsel. As discussed, it appears that defendant's attorney signed defendant's name and then subscribed his own initials, "MB." We note that an attorney generally is authorized to sign pleadings, including a notice of appeal, in his or her own name on a defendant's behalf. (See, e.g., Cal. Rules of Court, rule 8.304(a)(3).) The present record does not reveal why the attorney signed in defendant's name rather than his own, nor can we resolve on this record whether the signatures were "forged" or otherwise unauthorized. In any event, even if defendant's claim is true, defendant has identified, and we can conceive of, no prejudice to defendant, at least in the circumstances presented here. Defendant has therefore failed to carry his burden to establish that he is entitled to relief. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *In re Lucas* (2004) 33 Cal.4th 682, 721.)

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DISPOSITION

The judgment is affirmed.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.